ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 06-1425

	Opinion Delivered DECEMBER 10, 2008
THURMAN RUSSELL APPELLANT	APPEAL FROM THE BAXTER COUNTY CIRCUIT COURT, [NO. CR-2005-58-4]
V.	HONORABLE GORDON WEBB, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Thurman C. Russell was convicted by a jury of two counts of solicitation to commit capital murder. Arkansas Code Annotated section 5-3-301 (Repl. 2006) provides, in relevant part:

> (a) A person solicits the commission of an offense if, with the purpose of promoting or facilitating the commission of a specific offense, the person commands, urges, or requests another person to engage in specific conduct that would:
> (1) Constitute that offense;
> (2) Constitute an attempt to commit that offense;
> (3) Cause the result specified by the definition of that offense; or
> (4) Establish the other person's complicity in the commission or attempted commission of that offense.
> (b) Criminal solicitation is a:
> (1) Class A felony if the offense solicited is capital murder, treason, or a Class Y felony[.]

Mr. Russell was sentenced to two consecutive thirty-year prison terms.

Mr. Russell raises three arguments in this appeal. First, he argues that the trial court erred in refusing to recuse in this criminal case, despite having recused in a previous civil case involving the same parties. Next, appellant contends that the trial court erred in commenting on the evidence presented by the defense and in refusing thereafter to grant a mistrial. Finally, Mr. Russell argues that the trial court erred in permitting the hearsay testimony of Patricia Honeycutt, where she testified about alleged threats made by appellant outside her presence. We affirm.

The alleged intended murder victims in this case were Garry Kelton and his live-in girlfriend, Patricia Honeycutt. Appellant Thurman Russell and his wife, Carolyn, were owners of a boat and RV storage business, and entered into a lease/purchase contract with Mr. Kelton and Ms. Honeycutt in 1998. The contract provided that Mr. Kelton and Ms. Honeycutt had an option to buy the business after one year. Soon after the transaction, hostility grew between the parties, which by all accounts continued up until Mr. Russell's arrest on the current charges. In the interim, there have been a series of court battles between the parties, and Mr. Kelton and Ms. Honeycutt ultimately prevailed in a civil action wherein the Russells were ordered to sell them the property. In addition to the civil litigation, there have also been criminal allegations between the parties, which at one time resulted in a trespassing conviction and thirty-day jail sentence against Mr. Russell.

Johnny Loftin testified regarding Mr. Russell's solicitation of him to kill Mr. Kelton and Ms. Honeycutt. Mr. Loftin stated that he had never met any of these parties before March 16, 2005, when he went to a business owned by Mr. Russell looking to buy a part

for his boat. When Mr. Loftin asked about buying the part, Mr. Russell told him that he should buy a new boat. When Mr. Loftin said he could not afford to buy a boat, Mr. Russell indicated that "we could work out a deal." When Mr. Loftin asked what he meant by that, Mr. Russell replied that "he needed something took care of." Mr. Russell then proceeded to explain that there were some people that he wanted dead because they had been mistreating his wife and not paying on their lease. Mr. Loftin testified that he then became afraid, but told Mr. Russell that he knew some men in Louisiana who might be able to help him out. Mr. Russell told Mr. Loftin that if he could not help him, he would find someone else who would.

After he drove home from Mr. Russell's business, Mr. Loftin contacted the police. He told them that Mr. Russell seriously wanted somebody killed. As a result of their communications, Mr. Loftin agreed with the law enforcement authorities to wear a transmission wire and recording device and return to meet with Mr. Russell the following day to resume negotiations.

On March 17, 2005, Mr. Loftin again met with the appellant while wearing the wire and recording device. According to Mr. Loftin, Mr. Russell told him he could have any boat on the lot in exchange for killing Mr. Kelton and Ms. Honeycutt. Mr. Loftin indicated that the men from Louisiana would also need to be compensated, and Mr. Russell agreed to pay $10,000 with $2000 up front. Mr. Russell gave Mr. Loftin the title and registration to a pontoon boat, and Mr. Loftin hooked the boat to his truck and drove away with it. Before closing the deal, Mr. Russell also gave Mr. Loftin $2000 in cash. The remainder of the

$10,000 was to be paid after the murders were carried out. According to Mr. Loftin, Mr. Russell gave him photographs of Mr. Kelton so he would know who to kill.

Patricia Honeycutt testified that after taking over the boat and RV storage business from the Russells in 1998, there came a time where the Russells would harass them constantly. Ms. Honeycutt stated that despite their contractual agreement, Mr. Russell always insisted that the property still belonged to him. She estimated that the police had been called twenty to thirty times because of their confrontations. Ms. Honeycutt stated that pursuant to their option to buy the property that was enforced in the civil matter, the Russells were financing their purchase. However, she indicated that she had sent four checks to Mr. Russell toward the purchase price that Mr. Russell refused to cash. Ms. Honeycutt acknowledged that Mr. Russell had never made any threats to her that he was going to kill her or cause her harm. She maintained that she did not know Mr. Loftin before Mr. Loftin's meetings with Mr. Russell.

Garry Kelton also testified. Mr. Kelton corroborated the hostilities referenced by Ms. Honeycutt, and further stated that on many occasions Mr. Russell had threatened to shoot him or physically assault him. On one particular incident in 2000, Mr. Russell pulled a gun on Mr. Kelton and said, "I'm going to shoot you, you son-of-a-bitch, this is your last day." Mr. Kelton stated that this went on for almost eight years. Mr. Kelton also stated that he did not know Mr. Loftin before the solicitation charges were brought against Mr. Russell.

Mr. Russell testified in his defense. He acknowledged having a discussion with Mr. Loftin about Mr. Loftin buying a pontoon boat. Mr. Russell testified that at some point

during that discussion, Mr. Loftin said that Garry Kelton had sent him there to "set you up." Mr. Russell testified that he told Mr. Loftin that "I didn't want anything to do with anything like that." Mr. Russell further testified:

> He asked me what I would think about just turning this thing around and Garry had paid him $2000.00 down to do this. And then he said, "I'll give you the $2000.00 then when I come back Thursday to pick up the boat, then you can hand it back to me." And that's basically what happened. He said if I would go along with it that he would have a tape recorder so he could carry it back to Garry and get the balance of the money. He would then pay off the pontoon.

Mr. Russell's first argument on appeal from his convictions is that the trial court erred in denying his pretrial motion to recuse. Mr. Russell's motion was based on the fact that all of the judges in the Fourteenth Judicial District, including Judge Gordon Webb (the presiding judge herein), had previously recused in the civil litigation between the same parties. Mr. Russell asserts his belief that Ms. Honeycutt was a long-standing acquaintance of Judge Webb, and that Judge Webb should have recused in this criminal matter because Ms. Honeycutt was one of the alleged intended victims. Mr. Russell relies on Canon 2 of the Arkansas Code of Judicial Conduct, which provides that a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities. Moreover, Canon 3(E)(1)(a) provides that a judge shall disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned, including where the judge has a bias or prejudice concerning a party. Mr. Russell contends that Judge Webb abused his discretion in refusing to recuse because at the least there was an appearance of impropriety. Mr. Russell submits that this argument is further supported by his remaining two points on appeal wherein the bias of Judge Webb is demonstrated.

While a judge is required to recuse from a case in which his impartiality might reasonably be questioned, there is a presumption of impartiality, and the party seeking disqualification bears the burden of proving otherwise. *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996). The issue of bias generally is confined to the conscience of the judge, *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001), and it is a subjective matter peculiarly within the trial judge's knowledge. *Irvin v. State*, 345 Ark. 541, 49 S.W.3d 635 (2000). Absent some objective demonstration by the appellant of the trial judge's prejudice, it is the communication of bias by the trial judge that will cause us to reverse his refusal to recuse. *Id*. The decision to recuse is within the trial court's discretion, and it will not be reversed absent abuse. *Reel v. State*, 318 Ark. 565, 886 S.W.2d 615 (1994).

The facts related to the issue of recusal are as follows. In the civil matter, all of the Fourteenth Judicial District judges recused on May 7, 2002, on the basis that Ms. Honeycutt had been Judge Isbell's court reporter for several years and was well known to the other judges. However, at that time Judge Webb was not yet a sitting judge in the district. A special judge was appointed, but before the civil case was concluded that assignment was terminated at the special judge's request on August 8, 2003. Judge Webb became a circuit judge on January 1, 2003. By letter dated October 22, 2003, Judge Webb's case coordinator advised the Administrative Office of the Courts that all of the Fourteenth Judicial District judges had recused and requested the appointment of another special judge. However, at the hearing on appellant's motion to recuse, Judge Webb explained that he sought the appointment of a special judge in the civil case because he did not want to overrule the

decision of his predecessor to recuse. However, he further explained that at no time did he review the civil case and make a determination of whether or not he had a basis to recuse. Judge Webb stated that Ms. Honeycutt retired as a court reporter before he became a judge, and that they had no association in that capacity that would lead to the appearance of impropriety. While Judge Webb acknowledged that he was acquainted with Ms. Honeycutt, he indicated that that would not prevent him from fairly and impartially serving on the case.

We hold that Mr. Russell has failed to demonstrate any prejudice on the part of the trial judge, and that the judge did not abuse his discretion in refusing to recuse. Judge Webb indicated that his recusal in the civil matter stemmed from the decision of the previous judge and not a conscious decision by him to recuse. The record does not reveal any prejudice or bias by Judge Webb. As we will explain in our discussion of appellant's next two arguments, there was no reversible error made by the trial court in either instance, and there has been no demonstration by appellant of any judicial bias. Our supreme court has clearly held that the mere fact that some rulings are adverse to the appellant is not enough to demonstrate bias. *Kail v. State*, 341 Ark. 89, 14 S.W.3d 878 (2000).

Mr. Russell's next argument is that the trial court erred by commenting on and demeaning the evidence presented by the defense. During appellant's cross-examination of Mr. Kelton, Mr. Kelton was asked about the lease/purchase agreement and Mr. Kelton stated that even in the first year that he was leasing the business, he considered himself the owner. The State objected to the line of questioning because appellant was asking for a legal opinion from a lay witness, and further stated that the question had been asked and answered. In the

ensuing discussion, the trial court indicated that there had already been substantial testimony about the agreement and asked defense counsel to "move along." Defense counsel was again allowed to ask the question, and Mr. Kelton again stated that it was a lease/purchase and that "it looked as if I owned the property."

Mr. Russell moved for a mistrial below based on the trial court's comments, which the trial court denied. Mr. Russell argues on appeal that this was erroneous because the trial court's statements before the jury constituted impermissible comments that belittled the evidence being presented by the defense. Appellant relies on *Green v. State*, 343 Ark. 244, 33 S.W.3d 485 (2000), where the supreme court stated that a trial judge has a great influence on the jurors, and therefore must refrain from impatient remarks or unnecessary comments that might indicate his personal feelings or that might tend to influence the jurors to the prejudice of a litigant.

This argument fails for three reasons. First, it is not error for a trial court to deny a motion for mistrial when it was not made at the first opportunity, *see Ellis v. State*, 366 Ark. 46, 233 S.W.3d 606 (2006), and in this case Mr. Russell's motion for mistrial was not made until after Mr. Kelton's testimony was completed and two more witnesses testified. Mr. Russell's motion was untimely, and for this reason alone it was properly denied. Next, the decision to deny the motion was on the merits not an abuse of discretion because it is clear from our review of the record that the trial court's comments before the jury resulted in no prejudice; the trial court was merely trying to control the introduction of cumulative testimony and in fact permitted appellant's line of questioning of Mr. Kelton to continue.

The trial court is granted a wide latitude of discretion in granting or denying a motion for mistrial, and its decision will not be reversed absent an abuse of discretion or manifest prejudice to the complaining party. *Hamilton v. State*, 348 Ark. 532, 74 S.W.3d 615 (2002). We hold that under the circumstances of this case there was neither an abuse of discretion nor prejudice. Finally, an admonition to the jury usually cures a prejudicial statement unless it is so patently inflammatory that justice could not be served by continuing the trial. *Kimble v. State*, 331 Ark. 155, 959 S.W.2d 43 (1998). In the present case, any potential prejudice was cured when the trial court gave the following admonition to the jury:

> At this point I just simply want to advise you that under the law I have not intended by anything I have said or done or by any question that I may have asked to intimate or to suggest what you should find to be the facts or that I believe or disbelieve any witness who testified. If anything that I have said or done has seemed to so indicate, you will disregard it.

Mr. Russell's remaining argument is that the trial court erred in permitting hearsay testimony by Ms. Honeycutt about alleged threats made by the appellant outside of her presence. During direct examination of Ms. Honeycutt the prosecutor was inquiring about the multiple times that the police had been called, and asked her if any of appellant's threats were ever physical. Ms. Honeycutt responded:

> They weren't physical towards me. You know, because at that time I had a full-time job and I was gone sometimes late into the evening. So they were more – they more happened, you know, the minute I would leave for work.

Mr. Russell made a hearsay objection, which was overruled by the trial court. Mr. Russell now argues that this ruling was erroneous because Ms. Honeycutt's testimony was based on inadmissible hearsay and should have been excluded under Ark. R. Evid. 802.

We hold that even if Ms. Honeycutt's testimony was based on hearsay, its admission did not result in prejudicial error. Evidence that is merely cumulative or repetitious of other evidence admitted without objection cannot be claimed to be prejudicial. *Wingfield v. State*, 363 Ark. 380, 214 S.W.3d 843 (2005). In Ms. Honeycutt's testimony, she made it clear that there had been no physical threats made against her. To the extent she may have been referring in her testimony to physical threats made by appellant against Mr. Kelton, this was merely cumulative of Mr. Kelton's testimony where he testified in detail about how Mr. Russell had repeatedly threatened him with violence. Because appellant suffered no prejudice, no reversible error occurred.

Affirmed.

HART and BAKER, JJ., agree.